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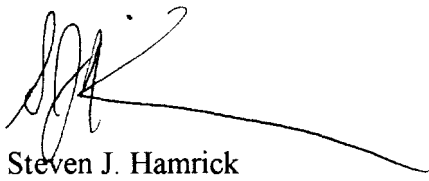
**Re: Bachow/Coastel, L.L.C.'s Comments,
WT Docket No. 97-112, CC Docket No. 90-6**

Dear Ms. Salas:

Bachow/Coastel, L.L.C. ("Bachow/Coastel"), pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, and by its attorneys, herewith files with the Commission the original and eleven copies of its above-referenced Comments. Exhibit One of this Petition contains a "telefax" signature; Bachow/Coastel will file the original signature with the Commission on May 16, 2000.

If you have any questions concerning these Comments, or if you require additional information, please do not hesitate to call.

Cordially,


Steven J. Hamrick

Counsel to Bachow/Coastel, L.L.C.

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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MAY 15 2000
FEDERAL COMMUNICATIONS COMMISSION
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ORIGINAL

In the Matter of

Cellular Service and Other Commercial Mobile
Radio Services in the Gulf of Mexico; Amendment
of Part 22 of the Commission's Rules to Provide for
Filing and Processing of Applications for Unserved
Areas in the Cellular Service and to Modify Other
Cellular Rules

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WT Docket No. 97-112
CC Docket No. 90-6

To: The Commission

COMMENTS OF BACHOW/COASTEL, L.L.C.

Bachow/Coastel, L.L.C. ("Bachow/Coastel"), pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, hereby files its Comments in response to the *Federal Register* publication¹ of the Commission's Second Further Notice of Proposed Rule Making² ("Second FNPRM") in the above-captioned proceedings. Bachow/Coastel is the B Block cellular licensee for the Gulf of Mexico Service Area ("GMSA"). Bachow/Coastel's cellular geographic service area ("CGSA") is coterminous with the GMSA.³

¹ See *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, 65 Fed. Reg. 24168 (April 25, 2000).

² See *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, Second Further Notice of Proposed Rulemaking, FCC 97-110 (1997).

³ See *Petroleum Communications, Inc. v. Federal Communications Commission*, 22 F.3d 1164 (D.C. Cir. 1994) ("Petroleum").

Pursuant to paragraph 68 of the Second FNPRM, Bachow/Coastel hereby identifies itself as a “small business” under the definition approved by the Small Business Administration.⁴

Bachow/Coastel acquired its cellular system from RVC Services, Inc. d/b/a Coastel Communications Company (“RVC Services”) in June 1996, pursuant to Commission approval.⁵ Bachow/Coastel understands that the other Gulf-based carrier, Petroleum Communications, Inc. (“PetroCom”), also qualifies as a “small business.” As such, Bachow/Coastel notes that the rules proposed in the Second FNPRM improperly favor large, land-based carriers at the expense of the license rights currently held by the smaller, Gulf-based carriers.

I. BACKGROUND.

The Second FNPRM is in response to the United States Court of Appeals for the District of Columbia Circuit’s (the “D.C. Circuit”) *Petroleum* decision, in which the D. C. Circuit held that the Commission acted arbitrarily and capriciously by not allowing water-based operators to define their CGSAs with flexible boundaries and asserted that former section 22.903(a) of the Commission’s rules does not take into consideration the unique operating circumstances facing

⁴ See Second FNPRM at ¶ 68.

⁵ See *RVC Services, Inc., d/b/a Coastel Communications Company and Bachow/Coastel, L.L.C.*, Order, 11 FCC Rcd 12136 (C.W.D. 1996). In 1990, Mobile Management Corporation (“MMC”) was named trustee and interim owner of the license, pursuant to Commission approval, after RVC defaulted on a bridge loan from Mitsubishi Electric America, Inc. that had been used to purchase the license. On October 1, 1990, the Commission granted its consent to an application for transfer of control of RVC to MMC from its existing owner. See File No. 06217-CL-TC-1-90. *Common Carrier Public Cellular Radio Service Information*, Public Notice, Report No. CL-91-5 (Oct. 4, 1990).

GMSA licensees.⁶ The D.C. Circuit remanded “this issue to the Commission with instructions to vacate § 22.903(a) insofar as it applies to GMSA licensees pending reconsideration. . . . [A]fter considering the record before us, we remain unpersuaded that the Commission has given due weight to factors bearing sharply on the wisdom or fairness of such a uniform standard.”⁷

The Second FNPRM proposes to divide the Gulf of Mexico Service Area (“GMSA”) into two cellular service areas: a GMSA Coastal Zone and a GMSA Exclusive Zone.⁸ The Coastal Zone would consist of the portion of the GMSA extending from the Gulf of Mexico coastline to the 12-mile offshore limit.⁹ The Commission’s proposed Exclusive Zone would extend from the 12-mile limit to the southern limits of the GMSA.¹⁰

In the Coastal Zone, the Commission proposes to apply its Phase II unserved area licensing rules as adopted in the *Ninth Report and Order* in PP Docket No. 93-253.¹¹ Under this scheme, the Commission would permit any qualified applicant to apply for sites to serve unserved areas within the Coastal Zone, and the Commission would utilize competitive bidding procedures for all mutually exclusive applications.¹² In the Exclusive Zone, the Commission

⁶ See *Petroleum* at 1164-65.

⁷ *Petroleum* at 1173.

⁸ See Second FNPRM at ¶ 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; see also *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Ninth Report and Order, 11 FCC Rcd 14769 (1996).

¹² *Id.* (citing 47 C.F.R. § 22.949(a)(2) (1995) and 47 C.F.R. §§ 1.2101-1.2111 (1995)).

proposes to allow the two existing Gulf carriers, Bachow/Coastel and PetroCom, to move their transmitters freely and modify or expand their service areas without facing competing applications.¹³

The Commission also proposed to dismiss without prejudice all Phase II applications to serve the GMSA pending as of April 16, 1997.¹⁴ Additionally, the Commission proposed to dismiss all pending applications for *de minimis* extensions into the GMSA.¹⁵ The Commission's proposed rules would permit the Commission to then accept Phase II filings to serve unserved areas within the Coastal Zone of the GMSA.¹⁶

II. THE PROPOSED RULES LACK NEED AND JUSTIFICATION.

The Second FNPRM is unique, in that since the *Petroleum* decision, the Commission does not produce any empirical or statistical justification for its proposed rules, and does not demonstrate a "need" in the public interest for the proposed rules. Nowhere in the Second FNPRM does the Commission cite a study, a test, or even a survey to demonstrate that these new rules for cellular service in the Gulf are needed. While there are statements from Bachow/Coastel's predecessor, RVC Services, such statements are nine years old.

Indeed, Bachow/Coastel will show *infra* that the circumstances that prompted the Commission's original application of unserved area rules to Gulf-based carriers have changed

¹³ *Id.*

¹⁴ *Id.* at ¶ 4.

¹⁵ *Id.*

¹⁶ *Id.*

and no longer provide a basis for this rulemaking. As such, as Bachow/Coastel demonstrates *infra*, the proposed rules would not withstand judicial review. However, there is ample evidence that the present rules serve the public interest without the adoption of a “Coastal Zone.”¹⁷ Thus, the Commission should terminate this rulemaking proceeding without adopting any of its proposed rules.

The Second FNPRM cited a 1991 RVC Services (Bachow/Coastel’s predecessor-in-license) statement that the majority of traffic in the Gulf is in the area closest to shore.¹⁸ Since 1991, coverage in all areas of the Gulf has expanded tremendously and uses of cellular have grown. Now, the traffic in Bachow/Coastel’s system is more evenly dispersed between the areas encompassing the Commission’s proposed Coastal Zone and Exclusive Zone.

The Second FNPRM is seemingly based upon circumstances from 1991 that no longer exist. There is traffic from many different types of subscribers in the Coastal Zone, and the Coastal Zone does not contain the majority of cellular traffic in the Gulf.¹⁹ Bachow/Coastel questions the purpose of the Coastal Zone, given that cellular traffic is now more evenly distributed throughout the Gulf.

¹⁷ Indeed, the “Coastal Zone” concept would only serve the private economic interest of the large land-based carriers at the expense of confiscation of service territory from the smaller Gulf-based carriers.

¹⁸ See Second FNPRM at n.63.

¹⁹ See Declaration of Robert Ivanoff, attached hereto as *Exhibit One*.

The summary of the Second FNPRM in the Federal Register states that “[S]ervice along coastal areas in the Gulf of Mexico has been unreliable.”²⁰ This sweeping statement is made without any factual support. Incongruously, the text of the Second FNPRM itself never claims any “unreliability” of cellular service in the Gulf. Indeed, the Second FNPRM does not cite any studies or analyses supporting the notion that cellular service in the coastal areas of the Gulf is unreliable. To the contrary, both Bachow/Coastel and PetroCom have continued to expand cellular service in coastal areas since the *Petroleum* decision, and coverage today is vastly improved from six years ago.²¹

The reason for the Second FNPRM’s “non-showing” is that cellular service is, in fact, entirely reliable in the coastal areas of the Gulf. Both Bachow/Coastel and PetroCom provide reliable cellular service for all of the coastal areas throughout the Gulf.²² Bachow/Coastel and Petrocom must compete on the quality and breadth of their coverage in all areas of the Gulf, including the coastal areas. In this regard, Bachow/Coastel and PetroCom are just like any other competing wireless carriers on land. Any remaining problems relating to Bachow/Coastel’s service in the coastal areas of the Gulf are not from a lack of coverage area, but rather from

²⁰ *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, 65 *Fed. Reg.* 24168-24169 (April 25, 2000).

²¹ *See Exhibit One.*

²² *See Exhibit One.*

interference caused by the land carriers' service area boundary ("SAB") extensions into the GMSA,²³ many of which are unauthorized.

Developments since the first incarnation of these Commission proceedings in 1993 have resolved any reliability issues that may have existed then. Bachow/Coastel has nearly doubled the number of cell sites that it operates in the Gulf of Mexico in the last three years.²⁴

Bachow/Coastel's predecessor, which was managed by a trustee, was not in a position to add additional cell sites during the trusteeship. PetroCom, the A Block cellular licensee in the Gulf, has implemented three land-based collocation agreements.²⁵ The Gulf-based cellular licensees possess the economic incentive to provide service in high-traffic areas throughout the entire Gulf of Mexico generally, and particularly in coastal areas, and they have expanded their service under the current regulatory structure.²⁶ The Coastal Zone proposed in the Second FNPRM would eviscerate these service advances by freezing the Gulf carriers' service areas into their current SABs,²⁷ and destroying the Gulf carriers' planned network expansions.

Certain carriers filing comments in this proceeding are likely to claim that cellular demand is unmet in the area of the GMSA off the west coast of Florida due to the Presidential

²³ See *Bachow/Coastel, L.L.C., Complainant v. GTE Wireless of the South, Inc., Defendant*, Order, 2000 FCC LEXIS 972 (E.B., released February 29, 2000).

²⁴ See *Exhibit One*.

²⁵ *Id.*

²⁶ See Bachow/Coastel Coverage Map, attached hereto as *Exhibit Two*.

²⁷ See Second FNPRM at ¶ 36.

proclamation²⁸ banning oil and gas drilling off that coast. However, there is not a scintilla of truth to such assertions, as reliable cellular service is provided throughout that region. The land-based carriers operate more than 4650 square miles of SAB extensions into the GMSA off the Florida coast, more than meeting the public's demand for cellular service there.²⁹

III. THE CURRENT RULES HAVE PRODUCED RESULTS.

The best regulatory scheme for providing reliable cellular service to the coastal areas of the Gulf of Mexico, and the only regulatory scheme with a proven record of success in doing so, is the current regulatory scheme, unaltered by the proposals of the Second FNPRM. The Commission's cellular rules are successfully being applied and interpreted by the Commission's bureaus for cellular matters arising in the Gulf. More importantly, under the current rules, the Gulf region has experienced unprecedented growth in cellular service coverage and, contrary to the Commission's assertions, have produced cooperation among carriers. Only the threats presented by the Second FNPRM have dampened the competitive and service benefits of the Commission's current cellular rules, as several land-based carriers deferred good-faith negotiations with Bachow/Coastel in the hope of obtaining additional license territory at no charge through the Commission's adoption of the proposed rules.

²⁸ See Presidential Proclamation Number 5030, 48 FR 10605, 1983 WL 85299 (Pres.).

²⁹ See Comments of Bachow/Coastel, L.L.C., 35 (July 2, 1997).

A. The Enforcement Bureau's Interpretation of the Current Rules will Enable the Gulf-Based Carriers to Develop the Coastal Areas.

As a reason for promulgating its proposed rules in the Second FNPRM, the Commission cited "conflict" that had "arisen between the land-based and water-based cellular carriers in the Gulf region over which carriers should provide service to coastal areas."³⁰ However, a subsequent development has provided the basis for certainty and order in determining which parties can serve these areas, thus resolving the "conflict" cited by the Commission in the Second FNPRM. That development was the Enforcement Bureau's decision in *Bachow/Coastel, L.L.C. v. GTE Wireless of the South, Inc.*³¹

In *Bachow*, the Enforcement Bureau applied sections 22.911(d)(2)(i) and 22.912 of the Commission's rules to determine that GTE Wireless of the South, Inc. ("GTE") violated those Commission "rules by having the SABs of the three cell sites overlap the Gulf of Mexico CGSA."³² Accordingly, the Bureau directed GTE to modify the three cell sites to eliminate the unlawful SAB extensions.³³ The Enforcement Bureau's decision and clear directive provided previously lacking guidance concerning what carriers can and cannot do in the GMSA. Moreover, this Enforcement Bureau decision gives the Gulf-based carriers an expectation of the protection they are to receive under the Commission's rules; the decision now permits

³⁰ Second FNPRM at ¶ 2.

³¹ See *Bachow/Coastel, L.L.C., Complainant v. GTE Wireless of the South, Inc., Defendant*, 2000 FCC LEXIS 972 (E.B., rel. Feb. 29, 2000) ("*Bachow*").

³² *Bachow* at ¶ 1.

³³ *Bachow* at ¶ 1.

Bachow/Coastel to expand its coverage in the Gulf by moving forward with further expansion of its network along coastal Alabama.³⁴ Bachow/Coastel only undertook this lengthy and costly project because negotiations for reciprocal extensions failed after numerous attempts and after Bachow/Coastel's best efforts.³⁵ This is an example of the method that land-based carriers use to delay the expansion of cellular service in the coastal waters by the Gulf-based carriers, while at the same time providing service in coastal waters using illegal SAB extensions. There is now precedent and certainty guiding the conduct of carriers in the GMSA, which was not present when the Commission first issued its Second FNPRM.

The certainty and order established by the Enforcement Bureau in *Bachow* have reduced the previous "conflict" in the GMSA, and obviate the need for the Commission's proposed rules. The current rules meet the Commission's objective for this proceeding by "providing a comprehensive regulatory scheme that will reduce conflict between water-based and land-based carriers."³⁶

Even before *Bachow*, there was never any reason for confusion concerning "which carrier should provide service to coastal waters."³⁷ Since August 14, 1985, the Commission authorized the Gulf-based carriers to provide service to coastal waters. That was almost 15 years ago. The Commission clearly defined the border between the land-based carriers and the Gulf-based

³⁴ See *Exhibit One*.

³⁵ *Id.*

³⁶ Second FNPRM at ¶ 2.

³⁷ *Id.*

carriers. “Conflicts” arose only when land-based carriers attempted to steal parts of the coastal waters with illegal and unauthorized SAB extensions.

B. Expanded Service Has Occurred Under the Current Rules.

Cellular service in the GMSA has been dramatically increased in all areas of the Gulf, including the coastal areas, under the current rules. Since 1997, Bachow/Coastel has nearly doubled the number of cell sites it operates in the GMSA.³⁸ Bachow/Coastel invested substantial amounts of capital to compete in the Gulf because its predecessor, while operated by a trustee, was undercapitalized and unable to expand its coverage in the Gulf. Bachow/Coastel has rectified this situation. In addition, PetroCom, the cellular A block carrier in the Gulf, has entered into three collocation agreements with land-based carriers.³⁹ Land-based carriers are availing themselves of mechanisms under the current regulatory scheme such as Special Temporary Authority and *de minimis* extensions to serve any temporarily unserved coastal areas, as well as coastal areas off the west coast of Florida.

These developments, all of which occurred under the Commission’s current regulatory structure, expanded available cellular service offerings in the GMSA, and, as witnessed by the A block Gulf carrier’s collocation agreements, fostered cooperation among carriers. Again, the current regulatory structure is meeting the Commission’s stated objectives: to achieve reliable

³⁸ *See Exhibit One.*

³⁹ *Id.*

cellular service to coastal areas,⁴⁰ and “to provide the best quality of service to the public.”⁴¹

Roaming rates, which the Commission hinted might be a factor in determining the boundary of the Coastal and Exclusive Zones,⁴² are already effectively covered by the just and reasonable rate provisions of Sections 201 and 202 of the Act.⁴³ Given the undeniable success of the current rules, the drastic modifications proposed in the Second FNPRM are unnecessary, and indeed would be counterproductive.

C. The Second FNPRM’s Proposed Rules and
Subsequent Three-Year Inaction Served Only to Stall
Service Expansion and Benefit “Deep Pockets” Land-Based Carriers.

In a harbinger of the future if the Commission adopts the rules proposed in the Second FNPRM, some land-based carriers already have become intractable in their dealings with the Gulf-based carriers since the Commission’s release of the Second FNPRM. Upon the Commission’s release of the Second FNPRM, some land-based carriers have refused to negotiate in good faith, or negotiate at all, in anticipation of seizing the proposed Coastal Zone area from the Gulf-based carriers’ licenses.⁴⁴ One land-based carrier stalled settlement negotiations in complaint proceedings in which they were the defendant in the hope that the Commission would adopt the rules proposed in the Second FNPRM before adopting an order finding the land-based

⁴⁰ See 65 *Fed. Reg.* at 21469.

⁴¹ See Second FNPRM at ¶ 2.

⁴² *Id.* at ¶ 34.

⁴³ See 47 C.F.R. §§ 201, 202 and 332(c).

⁴⁴ See *Exhibit One*.

carrier in violation of the Commission's rules.⁴⁵ Notably, no Gulf-based carrier has been able to successfully negotiate a collocation agreement with a land-based carrier since the Commission released the Second FNPRM, a development that has not enhanced the expansion of service to the public.

This experience should provide the Commission with a clear view of the source of the conflicts between the Gulf-based carriers and the land-based carriers. Under the established regulatory structure, service offerings to the public has expanded, carriers have cooperated and the rules have been enforced with certainty. Under the penumbra of the proposed rules, some land-based carriers willingly violated the Commission's rules and risked enforcement actions as part of their "license area grab," they refused to negotiate with the Gulf-based carriers, and service to the public was not enhanced. It should be clear to the Commission that the current regulatory scheme is the one that most benefits the public interest in the Gulf and its coastal areas.

**IV. THE COMMISSION'S PROPOSAL OF A
UNIFORM PROPAGATION METHODOLOGY FOR
SABs OVER WATER SHOULD NOT BE ADOPTED.**

The Commission also proposes to adopt a uniform propagation measurement methodology for SABs over water, whether they originate from a water-based or land-based cell.⁴⁶ Since it is universally acknowledged that signals carry further over water than over land,

⁴⁵ *See Exhibit One.*

⁴⁶ Second FNPRM at ¶ 37.

any uniform methodology adopted will favor land-based carriers. If the current Gulf formula is used for those parts of land-based SABs that are over water, the extensions of the land-based carriers into the Coastal Zone will be greater for purposes of determining their proposed CGSA. This makes permanent the interference problem the Gulf-based carriers have faced since the current formulae were adopted.

The Commission suggests that a uniformly applied “hybrid” propagation formula that considers the propagation characteristics over both water and land would be appropriate in the Gulf and coastal regions.⁴⁷ This suggestion received no support from the commenting parties in the first round of comments concerning the Second FNPRM in 1997. Among the commenters that did not favor this suggestion were ALLTEL, GTE and PetroCom.⁴⁸

The problem has been simply and correctly framed by the Commission: radio signals over land have different propagation characteristics than radio signals over water.⁴⁹ However, the answer lies not with the creation of yet another formula. A new formula would be administratively unwieldy and unnecessarily complex. Instead, the appropriate use of the existing formulae will demonstrate what the carriers already know and experience -- that the signals from the land-based carriers’ transmitters currently overpower the signals from the Gulf carriers’ transmitters, because such signals actually propagate much farther over water than their

⁴⁷ See Second FNPRM at ¶¶ 37-38.

⁴⁸ See *e.g.*, ALLTEL Comments at 3-4; GTE Comments at 12-13; and PetroCom Comments at 10.

⁴⁹ See Second FNPRM at ¶ 37.

land-based predicted contour calculations have assumed. Use of the existing formulae can rectify the the interference problem in the Gulf.

In the case of proposed land-based cell sites located within 35 miles of the coastline, the land-based carrier applicant should be required to include two calculations and depictions of the SABs using the existing land-based and water-based propagation formulae. In this manner, SABs using the water-based formula can be used to determine whether such SABs will in fact extend into the Gulf. The SABs using the land-based formula can be used for purposes of operational relationships between land-based systems.

If the water-based SAB from a land-based cell site extends into the CGSA of a Gulf-based carrier, the land carrier must either remove the contour extension or negotiate a contract extension agreement. This serves the Commission's objective of carriers working out the details of reliable cellular service along their respective borders without burdening valuable Commission staff resources. Conversely, the Gulf carriers should also include two calculations and depictions of all current and proposed sites within 35 miles of the coastline.

A contract extension agreement would only be required if the land-based SAB from a Gulf-based cell site extended into the CGSA of the neighboring carrier. A water-based SAB extension from a Gulf cell site into a land carrier's CGSA would be treated as de minimis and would not be part of the Gulf carrier's CGSA. This proposal minimizes the interference problem for both carriers. More importantly, this proposal makes negotiated agreements between neighboring carriers the best solution for providing reliable coverage along carriers' borders.

V. THE PROPOSED RULES WOULD NOT REDUCE “CONFLICT.”

Contrary to the Commission’s primary goal,⁵⁰ its proposed rules would not reduce conflict. The proposed rules would simply move the conflict 12 miles into the Gulf carriers’ existing CGSAs. Conflicts occur between carriers where economic interests collide. That occurs at the border. This situation is the same whether between two adjacent land carriers or between a land-based and a Gulf-based carrier.

Simply moving the border does not reduce conflict, it only relocates the conflict. The proposed rules for the border between the Coastal Zone and the Exclusive Zone is no different in how the existing border is regulated. The proposed rules would allow *de minimis* extensions into the Exclusive Zone because “carriers licensed to cover the GMSA Coastal Zone may need to extend into the GMSA Exclusive Zone by a small amount in order to provide reliable coverage to the area for which they have received a license.”⁵¹

This is the same type of rule that the land-based carriers have used to gain coverage into the Gulf-based carriers’ CGSA, and is a great source of interference. The proposed Exclusive Zone is not “exclusive” at all. The D.C. Circuit noted in its *Petroleum* decision that the Commission has granted *de minimis* extensions into the Gulf, but has not granted *de minimis* extensions to the Gulf-based carriers.⁵² That situation continues today.

⁵⁰ See Second FNPRM at ¶ 2.

⁵¹ Second FNPRM at ¶ 50.

⁵² See *Petroleum* at 1167-1169.

The proposed rules would grant to the land-based carriers *de minimis* extensions as part of the land-based carriers' CGSA.⁵³ This is another example of how the Commission would relicense the Gulf-based carriers' CGSA to the land-based carriers. If the Commission was sincere about permitting both land-based and Gulf-based carriers to serve coastal waters, it would have permitted *de minimis* extensions from all carriers on an equitable basis.

Furthermore, the proposed rules note that Bachow/Coastel has an application for review pending of the denial of Bachow/Coastel's "application for land-based facilities."⁵⁴ These facilities are not land-based, but are to be located on piers that are clearly within Bachow/Coastel's CGSA.⁵⁵ The critical issue is that Bachow/Coastel's applications reflect *de minimis* extensions into the land-based carriers' territory.⁵⁶ As noted by the D.C. Circuit, fairness requires that such applications by Gulf carriers be granted to the same extent as land-based carriers are allowed to make *de minimis* extensions into the GMSA.⁵⁷

⁵³ See Second FNPRM at ¶ 36.

⁵⁴ Second FNPRM at ¶ 57.

⁵⁵ See Exhibit One.

⁵⁶ See Exhibit One.

⁵⁷ See *Petroleum* at 1169.

**VI. THE PROPOSED RULES DO NOT ADDRESS THE
ISSUES REMANDED TO IT AND WILL FAIL JUDICIAL REVIEW.**

On appeal of the Commission's 1992 *Third Report and Order*, the D.C. Circuit held that, in promulgating a uniform standard for Gulf-based and land-based licensees, which froze the Gulf-based licensees' service areas at the status quo, the Commission had silently glossed over the differences between Gulf-based and land-based licensees.

We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently. But the converse is also true. An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties. The Commission itself recognized the significant differences between land-based and Gulf-based licensees prior to the instant rulemaking Despite the Commission's obvious, longstanding recognition of petitioners' unique plight, the *Third Report and Order* silently glosses over these differences, mandating that water-based and land-based licensees alike adhere to a uniform actual service area rule.⁵⁸

The D.C. Circuit held that the consequences of the Commission's new rule for Gulf licensees appeared to be dire:

Limited as [Gulf carriers] are to water-borne transmitters, petitioners go only where oil and gas sites permit. The new rule freezes petitioners' service areas as the status quo. When oil and gas rigs are deactivated, petitioners must close up shop. If new rigs do not open within reasonable proximity to the old, petitioners effectively lose the ability to serve part or all of their service areas.⁵⁹

The D.C. Circuit concluded that the Commission had overlooked the critical point, that "given the inability of Gulf licensees to place transmitters on land, Gulf service areas should not

⁵⁸ *Petroleum* at 1172-1173 (citations omitted).

⁵⁹ *Id.* at 1173.

be frozen at their current dimensions."⁶⁰ Bachow/Coastel notes again that without rules allowing land-based transmitters, three different A Block carriers have implemented land-based collocation cell sites. Negotiated agreements have produced what the rules have failed to do. Using the "arbitrary and capricious" standard, the D.C. Circuit remanded the issue back to the Commission for full reconsideration. The Commission's Second FNPRM was supposed to respond to the issues raised by the D.C. Circuit in its decision,⁶¹ but instead only exacerbates the problems identified by the D.C. Circuit in its *Petroleum* decision.

The D.C. Circuit found that the Commission's effort to freeze the Gulf carriers into their current cellular service areas failed to consider the fact that the Gulf carriers are at the mercy of oil drilling platforms that, unlike land-based transmitter sites, may move or be deactivated on a fairly routine basis.⁶² The Second FNPRM again fails to consider the plight of the Gulf carriers. Instead of following the dictates of the D.C. Circuit's remand, the Commission proposed to mandate the Gulf carriers to retreat into an arbitrarily-defined "Exclusive Zone," 12 nautical miles away from the coastline, and to freeze the Gulf carriers at their existing service areas in a so-called "Coastal Zone," within 12 nautical miles of the coastline. To compound this unfairness, the Second FNPRM further proposed that when a Gulf-based carrier loses any coverage in the Coastal Zone because of the move or deactivation of a serving oil drilling

⁶⁰ *Id.*

⁶¹ *See* Second FNPRM at ¶ 2.

⁶² *Petroleum* at 1167.

platform, the Commission would delete the lost coverage area from the Gulf-based carriers' cellular service area.⁶³

The cornerstone of the D.C. Circuit's decision was the unique service characteristics facing the Gulf-based carriers. The D.C. Circuit recognized that the Gulf carriers' service coverage is dependent upon availability of the waterborne platforms of oil and gas companies and that when those platforms change location, the Gulf carriers must relocate their facilities.⁶⁴ Thus, the D.C. Circuit concluded that "the territorial coverage of GMSA licensees inevitably fluctuates and is regionally limited to areas of current oil or gas exploration."⁶⁵ Given this factor of "uniqueness" about the Gulf carriers, the Commission cannot reasonably impose a "move it and lose it" rule⁶⁶ upon the Gulf carriers under the express directives of the D.C. Circuit remand order in *Petroleum*.

The D.C. Circuit rebuked the Commission for "silently" glossing over the Gulf-based carriers' "unique plight," and for adopting rules that made "water-based and land-based licensees alike adhere to a uniform" rule.⁶⁷ Additionally, the Second FNPRM's proposed rules do not

⁶³ See Second FNPRM at ¶ 2.

⁶⁴ *Petroleum* at 1168.

⁶⁵ *Id.*

⁶⁶ See Second FNPRM at ¶ 2.

⁶⁷ *Petroleum* at 1173.

serve the Commission's stated goal of providing "regulatory flexibility to Gulf carriers because of the transitory nature of water-based sites."⁶⁸

The D.C. Circuit cited Commission regulations that "do not permit licensees in the GMSA to build towers on land"⁶⁹ as the reason for the tenuous economic position faced by the Gulf-based carriers. The D.C. Circuit noted that "[a]s of January, 1992, the FCC had granted land-based licensees in Texas, Louisiana, Mississippi, Alabama, and Florida approximately sixteen contour extensions into the shoreline waters of the GMSA" under the *de minimis* exception to its rules that did not require the Gulf-based carriers' consent.⁷⁰ Touching on the fundamental unfairness of the situation in the Gulf, the D.C. Circuit also noted that the Commission would not grant the Gulf carriers a *de minimis* contour extension into adjacent land markets without the consent of the affected co-channel land-based carrier.⁷¹

The Second FNPRM exacerbates this unfairness. The proposed rules allow for land-based carriers' extensions into the GMSA Exclusive Zone, thus distorting the common meaning of the word "exclusive."⁷² However, the proposed rules do not allow the Gulf-based carriers the same flexibility for extensions onto land.

⁶⁸ Second FNPRM at ¶ 2.

⁶⁹ *Petroleum* at 1168.

⁷⁰ *Id.* at 1168-1169.

⁷¹ *Id.* at 1169.

⁷² See Second FNPRM at ¶ 50.

The Commission "itself recognized the significant differences between land-based and Gulf-based licensees prior to the instant rulemaking when it permitted Gulf-based licensees to define their service areas by reference to the entire Gulf of Mexico."⁷³ However, the Commission suddenly failed to account for these differences in the *Third Report and Order*, and then repeated its mistake in the Second FNPRM with its creation of the Coastal Zone. Instead of freezing the Gulf-based carriers into their currently served areas, which the Commission attempted to do in the *Third Report and Order* and the D.C. Circuit rebuffed, the Commission now proposes an even more restrictive freeze of Gulf carriers into their currently served areas within a twelve nautical mile span from the coastline into the Gulf. The Commission's proposed creation of the Coastal Zone completely ignores the D.C. Circuit's remand.

The D.C. Circuit found that the Commission's treatment of the issues raised by the Gulf carriers, i.e., the "total dependence on the location of oil and gas platforms, remote equipment sites, fluctuating service areas, and attendant high costs" had been "vexingly terse."⁷⁴ The Commission responded to the D.C. Circuit's ruling in amazingly meager fashion, with just a single sentence in which it admitted that the proposed rules in the Second FNPRM will "impose some hardship on licensees with transmitters on temporary platforms that are relocated through no fault of their own."⁷⁵ The Commission offers no explanation as to how these proposed rules comply with the D.C. Circuit's directives in *Petroleum*. The Commission's perfunctory,

⁷³ *Id.* at 1172-1173.

⁷⁴ *Id.* at 1172.

⁷⁵ Second FNPRM at ¶ 44.

unsupported statement of need for the Second FNPRM's proposed rules⁷⁶ will prevent a federal court from affirming these rules upon their certain appeal.

Given that the Commission has no record of data supporting its conclusion that its proposed rules are necessary, an appellate court would likely set aside the Second FNPRM. Under the Administrative Procedure Act ("APA"), the court "must set aside a Commission order if the record lacks 'substantial evidence' to support its conclusion, 5 U.S.C. § 706(2)(E), considering the 'whole record,' § 706."⁷⁷ "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."⁷⁸ A complete lack of evidentiary support for the rules proposed in the Second FNPRM falls far short of this judicial standard.

If the Commission chooses to adopt the auction rules it proposed in the Second FNPRM, it will face the task of defending its rules in federal court, rules that will fail for the same reasons that the Commission's *Third Report and Order* failed there. The Commission will need to mobilize human and financial resources to defend rules that, if ever implemented, would produce little revenue because the unserved areas of the Coastal Zone would be minuscule. If the Commission performed a cost-benefit analysis of how it should expend its resources for the public interest, it clearly would be spending those resources on matters other than enduring a costly legal battle to defend an auction scheme that currently could not produce any revenues.

⁷⁶ See 65 Fed. Reg. 24168, 24169 (April 25, 2000). See also the complete lack of empirical data supporting the Commission's assertion of the need for the Second FNPRM's proposed rules.

⁷⁷ *AT&T Corp. v. F.C.C.*, 3 CR 540, 545 (D.C. Cir. 1996).

⁷⁸ *Id.* (citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)).

**VII. THE PROPOSED RULES RESULT IN
A LICENSE MODIFICATION WITHOUT THE PROPER PROCEDURE.**

The Second FNPRM proposes to create a Coastal Zone by taking twelve miles of the Gulf-based carriers' license area extending the entire length of Gulf of Mexico and converting that area into a "free for all" license area for land-based licensees to file applications for temporarily unserved area.⁷⁹ The amount of geographic area taken from Bachow/Coastel's protected license territory is hardly *de minimis*, and would require a hearing under Section 316 of the Act. Furthermore, the proposed rules are not "rules of general applicability" that would allow the Commission to promulgate rules without holding a hearing concerning each affected license.⁸⁰ This proposed taking of licensed territory from two specific wireless licensees pursuant to a rulemaking is without precedent or justification.

The Second FNPRM severely reduces the licensed CGSA for Bachow/Coastel, and creates a new service area. This contraction of Bachow/Coastel's service area is akin to the switch of a community of license in broadcasting, which requires the Commission to provide notice and 30 days to respond pursuant to Section 316 of the Act.⁸¹ Bachow/Coastel's licensed area under the proposed rules would be so radically different as to destroy any notion that the

⁷⁹ See Second FNPRM at ¶ 33.

⁸⁰ See *Cellular Applications for Unserved Areas*, Further Order on Reconsideration, 6 CR 219, ¶¶ 37-39(1997).

⁸¹ See *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, Memorandum Opinion and Order, 11 FCC Rcd 16392, ¶ 4 (P.R.D., 1996).

modification of its license would be *de minimis*,⁸² and triggers the provision of Section 316 of the Act.

The Second FNPRM's proposed rules would remove all of the geographic protection from interference afforded to Bachow/Coastel under its existing license. Bachow/Coastel's current operations would certainly receive objectionable electrical interference as a result of the proposed rules. As such, longstanding precedent holds that the Commission must afford Bachow/Coastel the procedural protections of Section 316 of the Act, giving it the opportunity to show in hearing why the Commission should not modify Bachow/Coastel's license.⁸³

The Commission cannot credibly claim that Bachow/Coastel and PetroCom lack recourse under Section 316 of the Act because the Second FNPRM proposes rules of general applicability. Rules of general applicability are not based upon any facts peculiar to a licensee, and are not directed specifically at a licensee.⁸⁴ Rules of general applicability must apply to all carriers.⁸⁵

This is not the case in the Second FNPRM. Those proposed rules are based entirely upon Bachow/Coastel's status as a Gulf-based cellular licensee, and are directed specifically and

⁸² See *The Baltimore Radio Show, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 169, ¶ 6 (Rev. Bd. 1988).

⁸³ See *Santa Monica B/casting, Inc.*, Hearing Designation Order, 53 RR 2d 324, ¶¶ 4-6 (1983). See also *Western Broadcasting Company v. F.C.C.*, 674 F.2d 44 (D.C. Cir. 1982); *Bristol Broadcasting Company, Inc.*, Memorandum Opinion and Order, 68 FCC 2d 1070 (1978); *Olympian Broadcasting Corp.*, Memorandum Opinion and Order, 28 FCC 2d 399, ¶ 6 (1971); *Indian River B/casting Co.*, Memorandum Opinion and Order, 3 RR 2d 295 (1964).

⁸⁴ See *U.S. v. Daniels*, 418 F. Supp. 1074 (S.D. 1976).

⁸⁵ See *Market Entry and Regulation of Foreign-Affiliated Entities*, Notice of Proposed Rulemaking, 1 CR 2025, ¶ 91 (1995).

exclusively at Bachow/Coastel and PetroCom.⁸⁶ This is not a rulemaking of general applicability; otherwise, the Commission would create similar “free for all” licensing zones along the borders of each MSA across the United States.

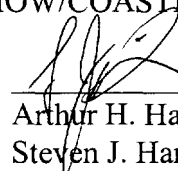
CONCLUSION

In light of the foregoing, Bachow/Coastel respectfully submits that the Commission should not adopt the rules it proposed in the Second FNPRM. Instead, the Commission should terminate the captioned proceedings and retain its existing rules, which have demonstrably resulted in reliable cellular service to the public throughout the Gulf region.

Respectfully submitted,

BACHOW/COASTEL, L.L.C.

By:



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Date: May 15, 2000

⁸⁶ See Second FNPRM at ¶ 5.

EXHIBIT ONE

DECLARATION OF ROBERT IVANOFF

I, Robert Ivanoff, declare under penalty of perjury that the following is true and correct to the full extent of my knowledge and belief:

1. I am the Vice President of Operations for Bachow/Coastel, L.L.C. ("Bachow/Coastel").
2. Bachow/Coastel is providing reliable cellular service for all of the coastal areas throughout the Gulf.
3. Bachow/Coastel has nearly doubled the number of cell sites that it operates in the Gulf of Mexico during its holding of the license for call sign KNKA412 over the last three years.
4. Bachow/Coastel and Petroleum Communications, Inc. ("PetroCom") have continued to expand cellular service in coastal areas of the Gulf since the court remand and coverage today is significantly improved from six years ago.
5. PetroCom, the A Block cellular licensee in the Gulf, has implemented three land-based collocation agreements.
6. There are no great expanses of "unserved areas" in the "well-traveled" coastal areas of the Gulf of Mexico Service Area ("GMSA") for which the Commission could conduct an auction.
7. The Enforcement Bureau's decision in Bachow permitted Bachow/Coastel to expand its coverage in the Gulf by moving forward with further expansion of its network along coastal Alabama.
8. Since the Commission released the Second FNPRM, land-based carriers have refused to negotiate in good faith, or negotiate at all, in anticipation of seizing the proposed Coastal Zone area from the Gulf-based carriers' licenses.
9. The applications for which Bachow/Coastel has pending Applications for Review do not involve land-based sites, but are sited on piers that are clearly within Bachow/Coastel's

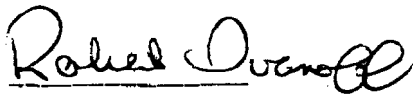
cellular geographic service area ("CGSA"). The issue is that these applications have de minimis extensions into the land-based carriers' territory, and the Commission has not granted those extensions.

10. Bachow/Coastel only undertook the lengthy and costly proceeding against GTE Wireless of the South, Inc., that resulted in the Enforcement Bureau's Order in *Bachow/Coastel, L.I.C., Complainant v. GTE Wireless of the South, Inc., Defendant*, Order, 2000 FCC LEXIS 972 (E.B., rel. Feb. 29, 2000) because negotiations for reciprocal extensions failed after numerous attempts.

11. There is traffic from many different types of subscribers in the Coastal Zone, and the Coastal Zone does not contain the majority of cellular traffic in the Gulf of Mexico.

12. I have read the foregoing Comments, and understand it to be true and correct to the full extent of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct to the full extent of my knowledge and belief. Executed on May 15, 2000.


Robert Ivanoff

CERTIFICATE OF SERVICE

I, Tonya Y. VanField, hereby certify that a copy of the foregoing Comments was served upon the following via hand delivery* and first-class U.S. mail on this 15th day of May 2000:

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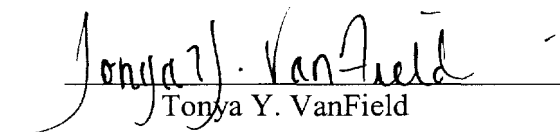
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